

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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MAY 26 1993

FEDERAL COMMUNICATIONS COMMISSION
DEPT. OF THE TREASURY

In re Applications of

SCRIPPS HOWARD
BROADCASTING COMPANYFor Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC.

For Construction Permit for a
New Television Facility on
Channel 2 at Baltimore,
MarylandMM Docket No. 93-94

File No. BRCT-910603KX

File No. BPCT-910903KE

To: The Honorable Richard L. Sippel
Administrative Law JudgeOPPOSITION TO MOTION TO ENLARGE
ISSUES RELATED TO TOWER SITE

FOUR JACKS BROADCASTING, INC.

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Dated: May 26, 1993

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SUMMARY

The "Motion to Enlarge Issues Related to Tower Site" filed by Scripps Howard Broadcasting Company is based on four central allegations -- none of which has any semblance of merit.

First, Scripps alleges that Four Jacks lacks reasonable assurance of the availability of its site -- despite the fact that Four Jacks' principals own the tower on which the Channel 2 facility will be located. Scripps' argument in this regard is naked speculation.

Secondly, Scripps contends that Four Jacks' tower "is not zoned for its intended use." This claim, however, arises from Scripps' own falsification of the facts before local zoning authorities. The Four Jacks antenna structure not only has received zoning approval to be built at its proposed height, but in fact was originally built at that height.

Third, Scripps challenges the ability of the tower to support Four Jacks' Channel 2 antenna. The study on which it bases this claim, however, is invalid. That study assumes a tower configuration that is not being proposed by Four Jacks. Scripps' request for the addition of financial issues, which is bootstrapped to its flawed suitability allegation, is also without merit.

Finally, there is no basis for Scripps' claim that Four Jacks misrepresented the height of its antenna structure. Four Jacks accurately specified the height of the structure as proposed, including the additional height resulting from the

Channel 2 antenna. Thus, there has been no misrepresentation, and there is no discrepancy to amend under Section 1.65.

For all these reasons, Scripps' motion to enlarge should be denied.

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To: The Honorable Richard L. Sippel
Administrative Law Judge

**OPPOSITION TO MOTION TO ENLARGE
ISSUES RELATED TO TOWER SITE**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.294(c)(1) of the Commission's Rules, hereby opposes the Motion to Enlarge Issues Related to Tower Site ("Motion") filed on May 13, 1993 by Scripps Howard Broadcasting Company ("Scripps"). At its best, the Motion ignores fundamental facts and misconstrues the law. At worst, the Motion is premised on blatant misrepresentation of facts and constitutes the latest example of Scripps' willingness to abuse the Commission's processes.^{1/} In any event, the Motion totally

^{1/} See Four Jacks' Motion to Enlarge Issues Against Scripps Howard Broadcasting Company, filed May 13, 1993, at 24-27.

fails to raise any question warranting a hearing issue, and it

tower to accommodate the Four Jacks Channel 2 antenna.^{2/} What Scripps in essence claims is that in order to possess "reasonable assurance" that the Catonsville tower was available to it, Four Jacks was required to gain the consent of WPOC(FM) (and other licensees whose antennas Scripps alleges would have to be moved) to the relocation.

3. Thus, in contrast to its entirely separate "suitability" claim, Scripps here is requesting a site availability issue against Four Jacks. In this regard, Scripps may be the first applicant in Commission history ever to allege a lack of site availability on the part of an opponent that owns its proposed site. The fundamental fact, which Scripps all but ignores, is that Four Jacks' principals own the Catonsville tower.^{3/} Four Jacks' research has not located, nor does Scripps cite, any Commission case in which a site availability issue has been added against an applicant that owns its proposed tower site.

4. Indeed, Scripps' claim on this point is pure conjecture. The only support it offers for its novel claim is a Declaration by Don E. Watkins, WPOC(FM)'s Vice-President of Engineering, in which it is stated that "to the best of [his] knowledge, no individual connected with either Cunningham or Four Jacks Broadcasting, Inc. has contacted anyone connected with

^{2/} This fact is not news; Four Jacks stated as much in its September 3, 1991 application. Thus, a misrepresentation is certainly not involved.

^{3/} Stated more specifically, the tower is owned by Cunningham Communications, Inc., an entity in turn owned by Four Jacks' principals.

Nationwide to discuss a move of the WPOC(FM) antenna to another location on the leased tower." Yet Scripps has submitted nothing to indicate that such a requirement exists, and nothing (not even Mr. Watkins' statement) to suggest that WPOC(FM) would refuse such a request even assuming it was necessary.^{4/} Moreover, Scripps' assertion that WPOC(FM)'s agreement to file a minor modification application was necessary before Four Jacks could possess reasonable assurance of site availability is nonsense. Such an application would not be necessary unless and until Four Jacks' Channel 2 application were granted.

5. In short, Four Jacks' principals own Four Jacks' antenna site. Thus, there is absolutely no basis for Scripps' naked speculation that Four Jacks' principals' own tower is unavailable for Four Jacks' Channel 2 antenna. Scripps' requests for site availability and misrepresentation issues based on this conjecture must be denied.

II. Scripps' Claim That Four Jacks' Site Is Not Zoned for Its Intended Use Is Baseless

6. Scripps secondly claims that Four Jacks' antenna site is not zoned for its intended use, and that therefore that "it [is] highly improbable that Four Jacks will be able to obtain the

^{4/} Assuming arguendo that WPOC(FM) would be averse to such a relocation, that still would not affect Four Jacks' reasonable assurance of site availability. Disputes over lease arrangements are private contractual matters in which the Commission does not involve itself. See Sonderling Broadcasting Co., 46 R.R.2d 889, 894 (1979) ("The Commission has consistently taken the position that it is not the proper forum for the resolution of private contractual disputes and that such matters are appropriately left to the courts or other forums which have the jurisdiction to resolve them.")

necessary zoning authority for its proposed tower." With this claim, Scripps reaches new heights of frivolity and recklessness.

7. Scripps' contentions in this regard are based on a February 12, 1992 letter from W. Carl Richards, Jr., a Baltimore County zoning coordinator, to Stephen J. Nolan, apparently a local attorney representing Scripps. See Motion, Exh. F. In that letter, Mr. Richards acknowledges that since 1969, the Catonsville tower has had approval from Baltimore County zoning authorities, under a special exception to the site's residential zoning, for a height of at least 850 feet.^{5/} In maintaining that this zoning approval has lapsed. and that "Four Jacks will

- (2) The work begun with the intention then formed to continue said work to its completion.

Obviously, if no work was commenced to extend the height, which appears to be the case, the second prong of the test would not have been met.

Motion, Exh. F, at 2 (emphases added).

8. As is obvious from this passage, Mr. Richards' conclusions were based on the factual assumption -- apparently supplied to him by Scripps agent Nolan -- that the Catonsville tower "was only built to a height of 666 feet" and was never built higher. This is patently false. As Four Jacks has repeatedly stated in pleadings before the Commission (and explains again below), the Catonsville structure was originally built to a height over 700 feet, as the WBFF(TV), Baltimore, antenna was mounted on the tower from 1968 to 1987. Thus, the opinion on which Scripps bases its zoning claim is buttressed on what Scripps' agent falsely stated to Mr. Richards -- that no work had ever been done to increase the tower's height over 666 feet when, in fact, the structure existed at a height over 666 feet for nearly two decades. Thus, Scripps' contention is based on its own patent misrepresentation of the facts. It plainly does not warrant addition of an issue; indeed, it is yet another example of Scripps' willingness to abuse the Commission's processes.

III. Scripps' Challenge to the Structural Suitability of Four Jacks' Tower Is Invalid

9. Thirdly, Scripps contends that the Four Jacks tower "is simply unsuitable for the contemplated use." The basis for this claim is a structural analysis commissioned by Scripps and performed by Matthew Vliissides, P.E., in which Mr. Vliissides concludes that the Catonsville tower cannot structurally support the Channel 2 antenna.^{6/}

10. However, as demonstrated in the attached statement by Herman E. Hurst, Jr., Four Jacks' consulting engineer (Exhibit A), Mr. Vliissides' study assumes a structural arrangement that is not being proposed by Four Jacks. Specifically, Mr. Vliissides assumes that the Channel 2 antenna will be placed on top of the existing 666 foot Catonsville tower. That is not what Four Jacks proposes. Instead, Four Jacks would reduce the tower structural steel to a height of 602 feet and then mount the Channel 2 antenna on top of the tower. This misassumption by Mr. Vliissides renders his study totally invalid, and incompetent to support Scripps' request for issue addition.^{7/}

^{6/} The study submitted with Scripps' Motion appears to be largely a replication of a study previously supplied in a petition to deny by Scripps against the Four Jacks application. In an Opposition to Petition to Deny Application, filed February 12, 1992, Four Jacks demonstrated that Mr. Vliissides' study was riddled with false assumptions.

^{7/} Moreover, Scripps' claim as to the structural suitability of the Catonsville tower is grossly premature. As Mr. Hurst points out in Exhibit A, structural analyses are routinely performed before any antenna is finally installed on a tower. A structural analysis will be conducted before the Channel 2 antenna is mounted on the Catonsville tower which
(continued...)

III. Four Jacks Has Not Misrepresented
the Height of Its Proposed Antenna
Structure

11. Scripps again raises its tired claim that Four Jacks "misrepresented the height of its proposed tower," and additionally requests a Section 1.65 issue concerning Four Jacks' alleged failure to amend its application to specify the "correct tower height." These assertions are just as meritless as when Scripps first made them.^{8/}

12. Once more, it is necessary for Four Jacks to set forth the entirely benign facts that give rise to Scripps' allegations. From 1968 (when it was first erected) until 1987, the antenna for television station WBFF(TV), Baltimore, Maryland (which is owned by Four Jacks' principals), was housed on the Catonsville tower.

~~The height of the antenna structure to the top of the WBFF(TV)~~

tower, was 381 meters (1249 feet) above mean sea level. In 1987, pursuant to FCC authority, WBFF(TV) relocated its antenna to a new tower structure, resulting in a 40-foot lowering in the overall height of the antenna structure.

13. It has always been the intention of Cunningham, i.e., Four Jacks' principals, to maintain the full 381 meter airspace clearance so that it would be available to potential users. Because the height reduction occasioned by the removal of the WBFF(TV) antenna was only temporary, Cunningham did not consider it necessary to notify the FAA of this temporary height reduction.

14. Four Jacks proposes in its application to situate its Channel 2 antenna in such a way that the full FAA-cleared 381 meters of airspace will once again be occupied. The Catonsville antenna structure has never been, and will not be upon construction of Four Jacks' Channel 2 facility, at a height exceeding that approved by the FAA.

15. Nonetheless, Scripps alleges that Four Jacks "misrepresented the height of its proposed tower in its application." This allegation is blatantly wrong. First, Section V-C, Question 7(a)(2) and (3) of Four Jacks' FCC Form 301 asks for the height, above ground and above mean sea level, of "the top of supporting structure." Question 7(a)(2) makes clear that this height "includ[es] antenna, all other appurtenances, and lighting, if any." (Emphasis added). Furthermore, FCC Form 301 asks for the structure height as it is being proposed by the applicant, not as it might presently exist. The application also

clearly indicated that Four Jacks intended to modify the existing tower.

16. In light of these facts, Four Jacks clearly specified the correct antenna structure height in its application: the proposed height of 381 meters AMSL, measured to the top of the Channel 2 antenna. Thus, Four Jacks did not misrepresent the height of its antenna structure, and there is nothing to report under Section 1.65.

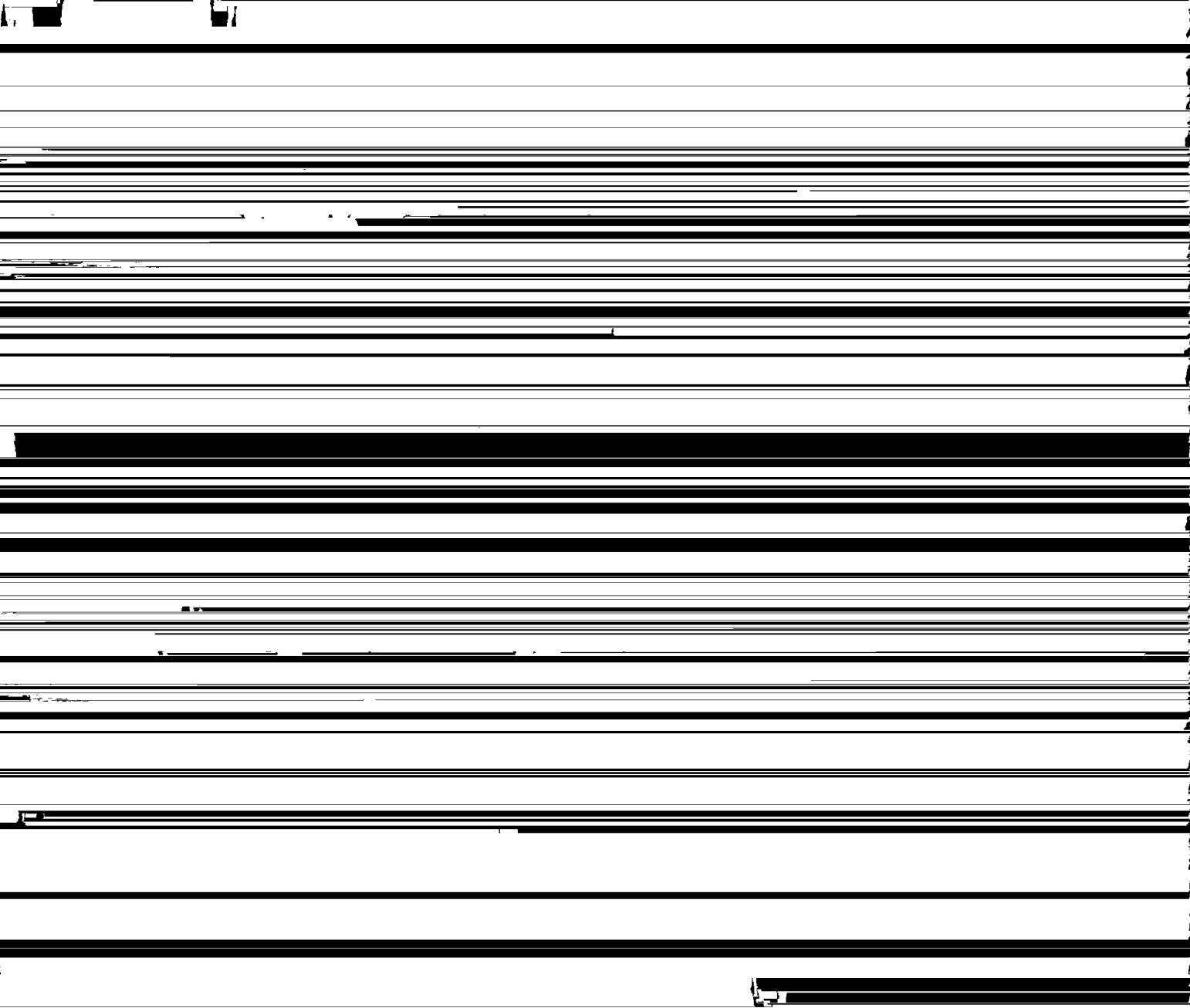
17. Moreover, even assuming for the sake of argument the dubious notion that Four Jacks stated an incorrect tower height, Scripps' Motion presents a total absence of any evidence of intent to misrepresent or conceal on Four Jacks' part. In this regard, Scripps' contention that "the fact of misrepresentation, not the motive behind it, is the determinative issue" is a flagrant misrepresentation of law. Quite contrary to Scripps' statement, the Commission has held that "an intent to deceive . . . lies at the core of all misrepresentation-like issues." Tequesta Television, Inc., 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987).^{9/} In this case, it is impossible to see what possible motive Four Jacks would have to "conceal" a structure height that is actually lower than that approved by the FAA. Scripps has failed to establish any of the elements necessary to add a

^{9/} In attempting to support its gross misreading of the law, Scripps miscites the statement of David Ortiz Radio Corp., 941 F.2d 1253, 1260 (D.C. Cir. 1991) that "[t]he fact of concealment may be more significant than the facts concealed." While this is certainly an established policy of the Commission, Scripps' citation of this principle ignores the equally established requirement that "the fact of concealment" entail proof of an intent to deceive.

hearing issue surrounding Four Jacks' specified antenna structure height.

IV. Scripps' Request for a Financial Issue
Against Four Jacks Is Ludicrous

18. Lastly, Scripps contends that Four Jacks has not "meaningfully ascertained" the costs of its Channel 2 facility, and therefore requests the addition of financial and financial



of these facts are considered, Scripps' request for financial issues -- unlike the Catonsville tower -- crumples under its own fallacious weight. The requested issues must be denied.

Conclusion

Scripps' multiple requests for the addition of issues are all based on misinterpretations -- and misrepresentations -- of fact. The Motion provides no basis for any of the issues requested, and accordingly, it should be denied.

Respectfully submitted,

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Dated: May 26, 1993

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10/ (...continued)

estimated costs of construction. By Scripps' own inflated estimate, a new tower to accommodate Four Jacks' proposal would cost only \$350,000. Thus, even assuming arguendo that (i) the Catonsville tower could not structurally accommodate Channel 2 antenna as proposed; (ii) Four Jacks' budget does not otherwise provide for tower expenses; (iii) a new tower or site is necessary; and (iv) the new tower or site would cost as much as Scripps estimates, Four Jacks still has sufficient funds to construct and operate the station for three months without revenue. Indeed, it would have a quite healthy cushion of \$150,000.

CARL T. JONES
CORPORATION

**STATEMENT OF HERMAN E. HURST, JR.
IN SUPPORT OF AN OPPOSITION TO A MOTION
TO ENLARGE ISSUES RELATED TO TOWER SITE
IN MM DOCKET NO. 93-94**

Prepared for: Four Jacks Broadcasting, Inc.

I am a Radio Engineer, an employee in the firm of Carl T. Jones Corporation with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Four Jacks Broadcasting, Inc. ("Four Jacks"), applicant for a new VHF television station to serve Baltimore, Maryland, on Channel 2+, to prepare this statement in support of an *Opposition to a Motion to Enlarge Issues Related to Tower Site* in MM Docket No. 93-94. The Four Jacks Application for Construction Permit (FCC File No. BPCT-910903KE) is mutually exclusive with the pending application of Scripps Howard Broadcasting Company ("Scripps Howard") for renewal of its license for WMAR-TV, Baltimore, Maryland (FCC File No. BRCT-910603KX).

On March 22, 1993, the Federal Communications Commission adopted the *Hearing Designation Order* ("HDO") in MM Docket No. 93-94 that designated the Four Jacks application and the Scripps Howard application for a comparative hearing to resolve

STATEMENT OF HERMAN E. HURST, JR.
OPPOSITION TO MOTION FOR ENLARGEMENT OF ISSUES
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the mutual exclusivity between the applications. The HDO in MM Docket No. 93-94 was released April 1, 1993. Scripps Howard filed a *Motion to Enlarge Issues Related to Tower Site* ("Scripps Howard Motion") in the instant proceeding on May 13, 1993. From an engineering standpoint, the Scripps Howard Motion requests issues related to the suitability and the height of the Four Jacks proposed support structure.

I. Four Jacks' Technical Proposal, Revisited

As stated in the original application, the tower must be modified to accommodate the top-mounted Channel 2+ antenna in order to maintain the tower's authorized airspace clearance. The tower reconfiguration would involve the relocation of the WPOC(FM) 2-bay antenna and, if necessary, physical modifications to the support structure to insure its structural integrity.

As has been clearly established, Four Jacks proposes to maintain the existing structure's authorized airspace of 709 feet above ground level (216.1 meters) and 1249 feet above mean sea level (380.7 meters). The vertical aperture of the proposed Channel 2+ antenna is 104 feet, and the height allowance for the tower beacon is 3 feet. As a result, the tower must be shortened to 602 feet (i.e., $709 - 104 - 3 = 602$ feet) in order to accommodate the proposed antenna and maintain the tower's authorized airspace. No change is or was proposed in the authorized height of the existing tower structure.

STATEMENT OF HERMAN E. HURST, JR.
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II. Site Suitability

Scripps Howard contends that the tower proposed by Four Jacks is "unsuitable" to support the Channel 2+ transmitting antenna. In support of this contention, the Scripps Howard Motion relies heavily upon a structural analysis, conducted by Vlissides Enterprises, Inc., based wholly upon the erroneous assumption that the Channel 2+ transmitting antenna will be top-mounted at the 666-foot level of the tower (this assumption would require an overall structure height of 770 feet: $666 + 104 = 770$ feet). As demonstrated in its original application and reiterated above, this is not and never was Four Jacks' proposed tower configuration. Consequently, the Vlissides structural analysis contained in Scripps Howard's Motion is both erroneous and without merit with regard to Four Jacks' proposed site utilization.

In any event, the results of a structural analysis of the proposed tower configuration at this time, even if performed correctly, are irrelevant. Four Jacks has stated in its original Application for Construction Permit, and reemphasized in the numerous pleadings associated with its application, that tower modifications will be conducted as necessary to accommodate the Channel 2+ transmitting antenna and associated equipment.¹ In addition, upon grant of the Four Jacks construction permit application, a complete structural analysis of the authorized tower configuration

¹ Four Jacks can attest to this fact because the tower is owned by Cunningham Communications, Inc., an entity owned by the Four Jacks principals.

STATEMENT OF HERMAN E. HURST, JR.
OPPOSITION TO MOTION FOR ENLARGEMENT OF ISSUES
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considering the final design parameters/equipment will be performed to assure the structural integrity of the existing tower structure. As routinely required in the implementation of an FM or TV construction permit, any necessary tower reinforcement, guy replacement, or tower modification will be performed at that time.

Scripps Howard also contends that the proposed site is "unsuitable" because the WPOC(FM), Baltimore, Maryland, FM transmitting antenna and "over eighty (80) licensees" must be relocated to allow for the installation of the Channel 2+ transmitting antenna. Actually, the required reconfiguration will consist of relocating only two (2) whip antennas and the 2-bay FM antenna. When Four Jacks is awarded the Channel 2+ construction permit, the three (3) affected tenants will be notified by Cunningham Communications, Inc., the tower owner, that their antennas must be relocated or repositioned. Appropriate applications for such changes, when finalized, will be submitted to the Commission. The actual facilities modification will not begin until all authorities are issued. This is the normal, accepted method for undertaking changes at multi-user/shared tower sites.

It is submitted that the site specified by Four Jacks is available and suitable for its proposed use.

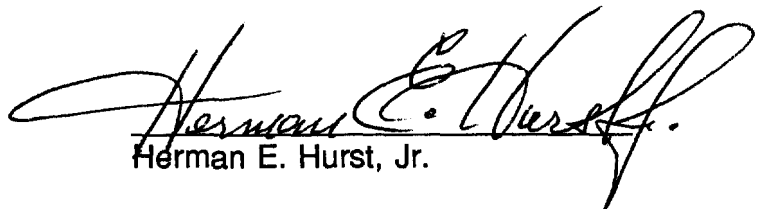
STATEMENT OF HERMAN E. HURST, JR.
OPPOSITION TO MOTION FOR ENLARGEMENT OF ISSUES
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III. Tower Height

Finally, Scripps Howard claims that Four Jacks misrepresented the height of the proposed tower structure. This claim is also completely false. As stated above, Four Jacks has clearly and repeatedly stated its intention to modify the existing structure and install the new Channel 2+ transmitting antenna such that the authorized height of the existing structure does not change (the airspace approval for the height of 1249 feet AMSL was originally granted on April 2, 1968, and reaffirmed on February 14, 1992, by the Federal Aviation Administration).²

This statement was prepared by me or under my direct supervision and is believed to be true and correct.

DATED: May 25, 1993



Herman E. Hurst, Jr.

² Four Jacks has responded to the issue contained in the HDO as to "whether there is reasonable possibility that the tower height and location would constitute a hazard to air navigation." It is submitted that the Four Jacks response explicitly puts to rest any question regarding the "record height of the specified tower".

CERTIFICATE OF SERVICE

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "OPPOSITION TO MOTION TO ENLARGE ISSUES RELATED TO TOWER SITE" were sent this 26th day of May, 1993, by first class United States mail, postage prepaid, to the following:

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